Petition

81-1548

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NO. 82-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

NATIVIDAD VASQUEZ,

Petitioner

v.

MCALLEN BAG & SUPPLY COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner, a person of Mexican-American descent also of Hispanic origin, and a migrant laborer, was laid off from his job with the Respondent in the beginning of the Summer of 1977. He had worked for the company for four years and each year he and others had been laid off for the reason that the work was mainly seasonal and the company did not need a full staff in the Summer time. At the end of the Summer the Petitioner showed up at work to resume his job and was told that they would not rehire him because he does not speak English. At least one other truck driver and other employees with the company did not speak English and they continued working. An English-speaking person of Mexican-American descent was later hired for the job. The questions presented are as follows:

1. Does §1981 prohibit discrimination based on national origin? Can there be a subclass of non-English speaking Hispanics within an overall class of Hispanics? Is language an inseparable characteristic of national origin?

2. Is a showing of intent to discriminate necessary in a discrimination suit brought pursuant to 42 U.S.C. §1981 against a private employer.

3. What standards should be used other than the Washington v. Davis, 42 U.S. 229 (1976) constitutional standards of intent in a 42 U.S.C. §1981 private employment discrimination case?

4. Did the Court err by imposing a disparate treatment requirement of intent in a disparate impact case?

PARTIES

Petitioner, Natividad Vasquez is a person of Hispanic origin who lives in the Lower Rio Grande Valley of Texas. The area is adjacent to Mexico and the population is more than 80% Hispanic in origin. The Petitioner speaks only Spanish and has a commercial driver's license.

The Respondent, McAllen Bag and Supply Company is a company with its office in McAllen, Texas which is also in South Texas. It is in the business of supplying boxes and bags to produce shippers. The Respondent hires between 20 and 30 persons with three full-time truck drivers and about seven more employees who drive trucks on occasion.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

The Petitioner, Natividad Vasquez, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals of the

Fifth Circuit, entered in this proceeding on November 6, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pg. 35, infra) is recorded at 660 F.2d 686. The opinion of the District Court for the Southern District of Texas, Brownsville Division (Appendix B, Pg. 38, infra) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1981. This petition for a Writ of Certiorari is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

In Title 42 U.S.C. §1981 states as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,

> and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner, Natividad Vasquez is a person of Hispanic origin who lives in the Lower Rio Grande Valley of Texas, the area is adjacent to Mexico and the population is more than 80% Hispanic in origin. The Petitioner speaks only Spanish and has a commercial driver's license.

The Respondent, McAllen Bag and Supply Company is a company with its office in McAllen, Texas which is also in South Texas. It is in the business of supplying boxes and bags to produce shippers. The Respondent hires between 20 and 30 persons with three full-time truck drivers and seven more employees who drive trucks on occasion. Petitioner begin working for the Respondent in

1973 as a truck driver. He was a seasonal employee and would work nine months of the year, working in other states as a migrant worker the other three months. The busy time of year for McAllen Bag and Supply is the growing season for fruit and vegetables in the Lower Rio Grande Valley of Texas which is in the non-Summer months. In the years prior to 1977 the Petitioner had left in the Summer and returned in the Fall to resume his employment. In 1977 the Petitioner was advised by his foreman that his job would be available when he returned in the end of the Summer. When he returned in October he was not rehired because the company had instituted a policy of hiring only English-speaking truck drivers. There was at least one other non-English-speaking truck driver who continued his employment with the Respondent and other employees who did not speak English. But for the reason to hire only English-speaking truck drivers, he would have been

rehired.

The original complaint in this cause was filed on May 22, 1978. The Plaintiff claimed that he had been discriminated against because of his national origin in violation of 42 U.S.C. §1981. Trial was held before the District Court on September 26, 1980; on February 19, 1981 final judgment was entered in the case in favor of the Respondent with the Court holding that in a case alleging discrimination in violation of 42 U.S.C. §1981, a showing of intent is necessary. The Court relied on Washington v. Davis, supra and Fifth Circuit cases. The case was appealed and on November 6, 1981 the Court of Appeals affirmed the District Court ruling and judgment was entered in favor of the Respondent. From this judgment the Petitioner makes his petition for a Writ of Certiorari.

REASONS FOR GRANTING WRIT

A. Discrimination Based On National Origin Is Covered By 42 U.S.C. §1981

There was a time in which it was contended that 42 U.S.C. §1981 only protected victims of racial discrimination and of those victims only blacks. However, since the case of McDonald v. Santa Fe Trail Transportation Company, 47 U.S. 273 (1976), this theory has rapidly lost its credence. In McDonald v. Santa Fe Trail Transportation Company, supra, the Supreme Court held that white persons were also protected by §1981 in private employment as well as non-whites. In the Supreme Court cases of Takahashi v. Fishing Game Commission, 403 U.S. 365, 377, the Supreme Court held that 42 U.S.C. §1981 provides protection to aliens. In Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974), the Court held that 42 U.S.C. §1981 covers aliens in cases of private discrimination. It is clear that §1981 is not limited to the protection of black persons only nor is it limited to issues

involving race alone. It clearly extends beyond race to other protective classes that have been historically discriminated in the same manner as blacks have been discriminated against. In the case of Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (1979), the issue is directly met and resolved in favor of extending §1981 to cover claims alleging discrimination based on national origin. The Court in Manzanares v. Safeway Stores, Inc., supra. goes at some length into a definition of race and what the term "white citizens" as taken from §1981 means. At page 971, the Court states,

> "Prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, its usage or image based on all the mistaking concepts of race."

Accordingly, it is the way a particular group is treated in a particular area that determines whether it is to be equated to race.

In Hernandez v. State of Texas, 347 U.S. 475 (1954), the Supreme Court considered the issue of discrimination directed towards persons of Mexican descent. The issue was whether the protection of the Fourteenth Amendment comtemplated only two classes - white and negro. Regarding extending the Thirteenth Amendment beyond black and white, the Court stated,

> But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. p. 478

The Court applied what has been formulated as "The Rule of Exclusion" page 480 and determined that persons of Mexican descent had traditionally been excluded from certain elements of society and therefore were a separate class for purposes of discrimination. Numerous cases have found that Mexican-Americans have traditionally been excluded in this manner in Texas and continue

to be so.

In the case of Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court considered the inseparability of language and national origin. The Court did not consider constitutional or equal protection issues and relied solely on §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d. The Act banned discrimination based on "the ground of race, color, or national origin in any program or activity receiving federal financial assistance." Nevertheless, under the decision reached by the court was one that could not have been reached but for the inseparability of language and national origin. The class in Lau, supra consisted of non-English-speaking Chinese students; not English-speaking Chinese. It was not alleged that the group discriminated against in Lau, supra consisted of all Chinese but only those without English-speaking ability. It is the same in

the case at bar. Even though this is not a class action, the Petitioner stands in the posture of a member of a class consisting of non-English-speaking Hispanics. The importance is that both the District Court and the Appellate Court failed to understand that language can by itself be an inseparable characteristic of national origin and that the discrimination can be directed against a language group apart from those in the national origin class who speak English. The reasoning is identical to that in Lau, supra.

In the Fifth Circuit case of Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), the Fifth Circuit considered an English only on the job speaking rule. While the Fifth Circuit found that in that particular instance, there was no discrimination based on national origin, the Court stated as follows:

> "To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,

> language might well be an immutable characteristic like skin color, sex, or place of birth. p. 270"

Were these statements applied consistently with the holdings in Lau, supra, the Fifth Circuit could only have found that the Petitioner had been discriminated against based on his national origin.

B. A Showing Of Intentional Discrmination Is Not Necessary In A Private Employment 42 U.S.C. §1981 Discrimination Case When Disparate Impact Is The Issue.

In Washington v. Davis, supra, the Supreme Court held that a showing of intentional discrmination was necessary in a suit seeking to enforce the Equal Protection provisions of the Fifth Amendment. It is alleged that a written personnel test given to prospective police recruits discriminated against Black applicants on the basis of race because the test excluded a disproportionately high number of Negroes and violated

their rights under the Due Process Clause of the Fifth Amendment and 42 U.S.C. §1981. The Supreme Court did not consider the §1981 issue and failed to mention it in any portion of the decision. Washington v. Davis, supra. consistently refers to only constitutional claims and official acts. Numerous passages in the decision are illustrative as is indicated by the following passages:

> "We had never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the [Title VII standards.]" 426 U.S. at 239 (emphasis added); This is not to say . . . that a laws disproportionate impact is irrelevant in cases involving constitution-based claims of racial discrimination." Id. at 241;
>
> "Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." Id. at 242;
>
> "We are not disposed to adopt the more rigorous [Title VII] standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as these." Id. at 247, 248;

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Id. at 239.

These are just a few of the many passages throughout the decision which make reference only to the Fifth and Fourteenth Amendments and official acts.

Circuits are in conflict as to whether a showing of intent is necessary in a 42 U.S.C. §1981 case with the Fifth Circuit (from which this petition for a Writ of Certiorari is brought) being a Circuit that has concluded that Washington v. Davis controls and a showing of intent is necessary. The error stems from the case of Williams v. Dekalb County, 582 F.2d 2 (5th Circuit, 1978) in which the Fifth Circuit states ". . . that a claim under §1981 is, for this purpose, to be equated with the claim under the Fourteenth Amendment." pgs. 2 and 3. The case is followed by a string of cases holding the

same: Crawford v. Western Electric Corp., 614 F.2d 1300 (5th Cir. 1980); Griggs v. North Mississippi Medical Center,Inc., 586 F.2d 457 (5th Cir. 1978); Vasquez v.McAllen Bag & Supply, supra. No Fifth Circuit case analyzes §1981 in detail and without exception all either involve state action or are disparate treatment cases which by their nature also require a showing of intentional discrimination. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); International Brotherhood Of Teamsters v. United States, 431 U.S. 324 (1977) The case at bar is not a disparate treatment case nor does it involve state action.

The Fifth Circuit and other Circuits have for some reason taken it for granted that Washington v. Davis, supra controls even non-state action 42 U.S.C. §1981 cases and do not even consider the possibility that Washington v. Davis, supra is not a

§1981 case.

The Supreme Court has indicated that it is well aware of the problem and that the issue is yet undecided.

In the case of County of Los Angeles v. Davis, 440 U.S. 625 (1979), the Supreme Court recognizes that even in a case involving state action, the issue of whether §1981 requires a showing of discriminatory intent was not resolved by Washington v. Davis, supra. County of Los Angeles v. Davis, supra, never reaches the issue because on certiori, the Supreme Court vacates and remands with direction for the Court of Appeals to enter an order directing the District Court to dismiss the action for the reason that the case had become moot.

Other circuits have considered the issue of §1981 and the requisite for intent. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), vacated it moot, 440 U.S.

625; Guardians Association of New York City v. Civil Service, 633 F.2d 232 (2nd Cir. 1980); Mescall v. Burrus, 603 F.2d 1266 (7th Cir. 1979). Davis v. County of Los Angeles, supra. holds that intent is not a necessary element of proof pursuant to §1981, Guardians Association of New York City and Mescall both hold that proof of intent is necessary. All three involve state action and are also brought pursuant to the Fourteenth Amendment and §1983. Davis v. County of Los Angeles and Guardians Association of New York City both go into the issue in great detail and come up with different opinions.

The 9th Circuit in Davis v. County of Los Angeles, supra. clearly addresses the issue and gives a very detailed consideration to the necessity showing intent in a §1981 case. The Court finds that Washington v. Davis, supra does not require a showing of discriminatory intent in a §1981 case for the

reason that Washington v. Davis, supra only applies to cases brought pursuant to the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments and cases brought pursuant to 42 U.S.C. §1981 do not have to rely on the Fifth or Fourteenth Amendments to the United States Constitution in order to sustain themselves. This argument is even more clear in a case in which there is no state action and in which an allegation that the Fifth and Fourteenth Amendments have been violated could not be sustained.

The opinion in Guardians Association of New York City relies on a dissent in the Davis case. The panel in Guardians Association of New York City includes two non-circuit district court judges. None of the cases consider the contradictions involved in applying Fourteenth Amendment standards to private employment cases. The thrust of the argument in the dissenting

opinion of Davis and the opinion of the Court in Guardians Association of New York City is the belief that §1981 "enjoys the unique historical and conceptual relationship to the Fourteenth Amendment . . ." Davis v. County of Los Angeles page 1349. Because of this relationship and dependence upon the Fourteenth Amendment, both the dissent in Davis and the court in Guardians Association of New York City maintain that the same standards applicable under the Fourteenth Amendment are applicable under §1981. This is the cornerstone of the arguments which maintain that intent is necessary under §1981 stand. Without it their building falls and in this case it falls because their interpretation of §1981 and its relationship to the Fourteenth Amendment is wrong. Both cases rely on Runyon v. McCrary, 427 U.S. 169 (1976) for the proposition that §1981 relies on the Fourteenth Amendment. Runyon v. McCrary, supra. holds just the opposite and

states unequivocably that 42 U.S.C. §1981 and §1982 are not based on the Fourteenth Amendment. The dissent in Davis and the majority in Guardians Association of New York City, supra. maintain that after the Civil Rights Act of 1866 was enacted, which included §1981, Congress and others became worried that there was no validity for enacting the statute and therefore passed the Fourteenth Amendment and re-enacted the portions of the 1966 Act which then became 42 U.S.C. §1981. The portions re-enacted are predicated upon the Fourteenth Amendments and therefore would be bound by whatever standards are required by the Fourteenth Amendment. The Fourteenth Amendment was enacted in 1868 and in 1870, the Voting Rights Act of 1870 was enacted. 42 U.S.C. §1981 includes Section 1 of the 1866 Act and Section 16 of the Voting Rights Act of 1870. Those who argue in favor of intent maintain that Section 16 of the Voting Rights

Act of 1870 is clearly a Fourteenth Amendment statute and it is the portion of §1981 under which the discrimination law suits are brought. Runyon v. McCrary, supra. is a case in which the Supreme Court determined that §1981 applies to private acts of discrimination. In arriving at that conclusion, the Supreme Court also held that §1981 is not based on the Fourteenth Amendment. In Tillman v. Wheaton - Haven Recreation Association, 410 U.S. 431 and Runyon v. McCrary, supra, the Court noted that "the operative language of both §1981 and §1982 is traceable to the Act of April 9, 1866. Tillman, supra. at 439, Runyon v. McCrary, supra, at 171.

In the footnotes of Runyon v. McCrary, 49 L.Ed. 423, note 8, the Supreme Court goes into a detailed analysis of the history of §1981. The legislation which became 42 U.S.C. §1981 was written in its present form

in 1874. It was prepared by special commissioners appointed pursuant to the Civil Rights Act of 1866, Section 1, and Section 3, to consolidate all statutes of the United States by "bringing together all statutes and parts of statutes which, from similarity of subject, are to be brought together, omitting redundant or obsolete inactments . . ." As determined by the Supreme Court in Runyon v. McCrary, supra, the Commissioners drew upon the 1870 Act and the 1866 Act for the final portion which became 42 U.S.C. §1981. The Supreme Court found that they did intend to repeal the 1866 portions of the Act and that there was clearly no intent to rely solely on the Fourteenth Amendment portions of the Act. The 1866 portions were left to stand for the express purpose of insuring that §1981 would apply to private discrimination and that in order to do so it was not dependent in any way upon the limitations and

standards of the Fourteenth Amendment.

In Runyon v. McCrary, supra, the Court makes reference to the case of Jones v. Alfred H. Mayer Company, 392 U.S. 409, which held that 42 U.S.C. §1981, which is also derived from Section 1 of the 1866 Civil Rights Act, also prohibits private racial discrimination in a sale or rental of real or personal property. In interpreting Section 1 of the 1866 Act, the Court's holding was that the "Act was designed to do just what its term suggests: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein . . ." (emphasis added) Jones, supra. at 436, Runyon, supra. at 170. The appellant contends that when the Court states "prohibit all racial discrimination" it meant all racial discrimination. In order to achieve the purpose of the Act and to comply with the Supreme Court's interpretation in

Jones and Runyon, it is essential that the standard of intent not be applied to §1981; otherwise, "all racial discrimination" will not be prohibited and the term becomes meaningless. As of the writing of this brief, every published case which has held that a showing of intentional discrimination is necessary in a discrimination case brought pursuant to §1981, has been a case involving public employment or as in two instances disparate treatment. The holdings that proof of intentional discrimination is necessary are based on the theory that §1981 derives its authority from the Fourteenth Amendment which is previously stated, only applies to state action.

It is an anomaly that in Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) the Fifth Circuit seems to recognize that the intent requirement in a §1981 case would only apply in a case involving state action. At page 1000 the Court states:

> "Thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under Title VI, 42 U.S.C. §1981 or §1983." (emphasis added)

C. What Standards Should Be Used Other Than The Washington v. Davis, 42 U.S. 229 (1976) Constitutional Standards Of Intent In A 42 U.S.C. §1981 Private Employment Discrimination Case?

A question exists as to what standards should be applied in interpreting a §1981 case and providing a remedy. In order to achieve the purpose as stated in Jones v. R. H. Mayer Company, supra. that the Act is designed to "prohibit all racial discrimination" one should apply standards not only readily available but those which are the most comprehensive. In Alexander v. Gardner - Denver Company, 415 U.S. 36, 47 (1974) the Court states . . "legislative enactments in this area have long events a

general intent to a court parallel or overlapping remedies against discrimination." With the footnote making reference to 42 U.S.C. §1981 and the Civil Rights Act of 1866. Circuit Courts of Appeals have followed the example. In Waters v. Wisconsin Steel Works Of International Harvester Company, 502 F.2d 1309, 1316 (7th Cir. 1974) the Court stated as follows:

> "Consequently, in fashioning a substantive body of law under §1981, the Court should, in an effort to avoid undesirable substantive law conflicts, look to the principals of law created under Title VII for direction."

In Blum v. Gulf Oil Corporation, 597 F.2d 936 (5th Cir. 1979), the Fifth Circuit held the same. Oddly enough, in Crawford v. Western Electric, supra. a case cited by both the District Court and the Appellate Court against the Petitioner, the Court applied the standards of McDonnell Douglas v. Green, supra. in interpreting §1981. In

the case at bar the substantive law of Title VII should be looked to in determining burden of proof, what constitutes a prima facie case, and what is necessary in the case involving disparate impact. This is because it involves a private employer and Washington v. Davis, supra. cannot logically control.

D. Did The Court Err By Imposing A Disparate Treatment Requirement Of Intent In A Disparate Impact Case?

This case is a disparate impact case. The court below made the mistake of applying a standard that is only relevant to a disparate treatment case. Disparate treatment derives its substantive law, theories of burden of proof and what constitutes a prima facie case from McDonnell Douglas v. Green, supra. Disparate impact cases look to Griggs v. Duke Power Company, 410 U.S. 424 (1971). A disparate treatment case requires a showing of intent and a disparate impact case does

not require a showing of intent, only a discriminatory result or impact on a protected class. The Petitioner as a non-English-speaking Hispanic is like the non-English-speaking Chinese in Lau, supra., subjected to a policy that while neutral on its face adversely affects him as it would others like him. The Court should not concern itself with superficial distinctions relative to racial pattern hiring but instead, ascertain the intent behind the Griggs, supra. Supreme Court Equal Employment Opportunity Doctrines and implement them to the fullest extent. Pertinent in this regard is the following where the Supreme Court in Griggs, supra. states that:

> In Griggs, the Supreme Court expounds on the concept of equal employment opportunity principles and mandates that practices, procedures, or test natural on their face, cannot be maintained if they operate to "freeze" the status quo or prior discriminatory employment practices. In Griggs, the Court further

> dictates that removal of artificial, arbitrary, and unnecessary barriers is required when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 401 U.S.C. at 431.

The discrimination is exactly a type of discrimination prohibited by the Supreme Court Doctrines produced in Griggs, supra. The intent of Griggs, supra. is to alleviate discriminatory employment practices which, while neutral on their face, operate in practice to have an adverse impact on persons or members of a class because of race, creed, sex, and national origin, or religion. The case at bar is clearly within the scope of the Griggs Doctrine.

In fashioning remedies to identify and to eliminate employment discrimination, courts can consider the history and reality of the social environment limiting opportunities for minority workers. The Supreme Court considered such social reality in

Griggs (Blacks as a group are less likely to graduate from high school). The Supreme Court, more recently, in Steelworker v. Weber, 443 U.S.C. 193 (1979) considered the reality of the minority individual's circumstances in reaching its decision in favor of voluntary affirmative action program. Steelworker v. Weber, supra. at 212.

Once the Petitioner proved his prima facie case of discrimination, the burden of justifying the rule shifts to the Respondent. The record supports the District Court's findings of fact that the rule was preferable, but not necessary, for adequate performance of the job in accordance with the business necessity standards. The most recent formulation of the business necessity rule is found in Albermale Paper Company v. Moody, 422 U.S. 405 (1975), where the Supreme Court dictates that:

> discriminatory tests are impermissible unless shown by professionably acceptable methods, to be

> predictive of or significantly correlated with important elements of work
>
> behavior which comprise or are relevant to the jobs for which candidates are being evaluated.

Applying this standard, Respondent failed to meet its burden of proof, as the District Court (per Judge Vela) in his findings determined the rule was preferable, but not necessary for adequate performance of the job.

And again in Albermale, supra. the Court states:

> The burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question. Griggs, at 432, Albermale, at 425.

One of the requirements is that the jobs be analyzed in terms of the particular skills required. This is what is termed the business necessity defense which was raised by the Respondent. However, the Respondent has the burden of presenting competent persuasive

evidence in support of its defense and this it did not do.

Pettway v. American Cast Iron Company, 494 F.2d 211, 244 (5th Cir. 1974) set forth the standards which should have been applied in the case at bar. The Fifth Circuit restricted the availability of the business necessity defense to a limited number of cases and in so doing said:

> "This doctrine (business necessity justification) has evolved to accept those few employment practices, which are non-intentionally discriminatory or neutral, but perpetuate the consequences of past discrimination, because of their overriding business necessity." at p. 244.

The Court in Pettway, supra. also outlined the Defendant's burden of proof in asserting a business necessity defense by stating:

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is

> necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact." at pg. 245.

See also Edwin L. Wiegard Co. v. Jurinko, 414 U.S. 970 (1973). This is the standard that should have been adhered to and was not.

By relying on substantive law of Title VII, one is drawn to Griggs v. Duke Power Company, supra. as the standard which should be applied in this a disparate impact case. The standard was not followed and as a result an erroneous decision was made which affects a large number of people in this country.

CONCLUSION

In conclusion it is clear why the Court should grant Petitioner's Petition for a Writ

of Certiorari. Title 42 U.S.C. §1981 protects those discriminated against because of national origin. A subclass and individuals who are of a specific national origin and do not speak English are entitled to protection as held in Lau v. Nichols, supra. Petitioner is a Hispanic who does not speak English and is entitled to protection for that reason. The issue of the requisite of intent in a §1981 case is one which must be decided and this case will properly accomplish that purpose. Guardians Association Of New York City v. Civil Service, supra. is presently before this Court on a Petition for a Writ of Certiorari which has been granted. However, that case also involves state action and the issues decided may not determine the issues presented by the case at bar which involves private employment.

In order to combat all discrimination, §1981 should encompass the most comprehensive relief available which includes substantive

law found under Title VII. In so doing one must apply the standards as espoused in Griggs, supra. relating to disparate impact and a requirement of intent and business necessity are not relevant in a case relying on Griggs. By failing to follow the law as stated in Griggs the Fifth Circuit and the District Court have erred and potentially created a body of law which must be corrected. For the foregoing reasons, the Petitioner prays that the Court consider this Petition and grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

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By: _____
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ATTORNEYS FOR PETITIONER

Appendix

Natividad VASQUEZ,
Plaintiff-Appellant,

v.

McALLEN BAG & SUPPLY COMPANY,
Defendant-Appellee.

No. 81-2114
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 6, 1981.

A Spanish-speaking truck driver appealed from an order of the United States District Court for the Southern District Court of Texas, Filemon B. Vela, J., denying his claim of discriminatory hiring practices on the basis of national origin. The Court of Appeals, Tate, Circuit Judge, held that an action under the civil rights statute mandating equal treatment under the law requires proof of discriminatory intent, and, therefore, the Spanish-speaking truck driver could not recover where the employer's English-speaking requirement was not shown to be

based on a discriminatory intent.

Affirmed.

1. Civil Rights - 13.13(1)

In action under civil rights statute mandating equal rights under law, it is necessary to prove discriminatory intent. 42 U.S.C.A. § 1981.

2. Civil Rights - 44(1)

Spanish-speaking truck driver failed to establish claim of discriminatory hiring practice on basis of national origin where employer presented evidence that his policy of hiring only English-speaking truck dirvers was supported by legitimate, non-discriminatory reason, and English-speaking requirement was not shown to be instituted for purpose or intent of discriminating against Mexican-American. 42 U.S.C.A. §1981.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, GARZA and TATE, Circuit Judges.

TATE, Circuit Judge:

The Plaintiff, Natividad Vasquez, appeals from the district court order denying his claim of discriminatory hiring practices on the basis of national origin under 42 U.S.C. §1981. The discriminatory practices alleged is a requisite that the applicant for a truck driver's position be able to speak English, in an area where 85 percent of the population is of Mexican-American origin and where 60 percent of the population are monolingual Spanish-speaking persons. The dispositive issue in this appeal is whether a suit brought under section 1981 requires proof of discriminatory intent. The district court found the plaintiff had not proved such intent on the part of the defendant. We affirm.

Natividad Vasquez, who speaks only Spanish, had been periodically hired as a

seasonal truck driver for the defendant company, McAllen Bag & Supply Company, a small, privately owned company which employs between twenty and thirty persons. He had performed his duties satisfactorily in the past. Pursuant to a policy of hiring only English-speaking truck drivers instituted by the defendant in 1977, the plaintiff was not re-hired when he re-applied for seasonal employment as had in the past been readily accorded to him. Vasquez filed the present suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981 alleging discrimination on the basis of national origin. The plaintiff's Title VII claim of national origin. The plaintiff's Title VII claim was dismissed for failure to satisfy the jurisdictional pre-requisites.

After a bench trial on the section 1981 claim, the district court found that, while the employer's policy would tend to discriminate against Mexican-Americans because a

significant number do not speak English, there was no showing made that the employer (who can communicate with his drivers only in English) had the requisite discriminatory motive in instituting a policy of hiring only English speaking, or bilingual, truck drivers. The Plaintiff's appeal principally questions the district court's finding of law that, despite discriminatory impact, a section 1981 claimant cannot recover against his employer for the discriminatory practice unless it was motivated by discriminatory purpose.

Initially, we pretermit the issue raised by the defendant as to whether Vasquez stated a claim of discrimination based on national originl that is cognizable under section 1981.[1] Assuming, arguendo, that the

1. See Bullard v. Omi Georgia, Inc., 640 F.2d 632, 634, (5th Cir. 1981); Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970 (10th Cir. 1979); Alvarado v. El Paso Independent School District, 445 F.2d 1011 (5th Cir. 1971).

plaintiff's suit does state a section 1981 cause of action, we hold that the district court was not clearly erroneous in its finding that the plaintiff failed to show the discriminatory intent necessary to prove a claim under section 1981.

[1] With regard to the discriminatory intent issue, in Crawford v. Western Elec. Co., Inc., 614 F.2d 1300 (5th Cir.), reh. denied, 620 F2d 300 (1980)--a suit based on claims of racially discriminatory employment practices against a private employer--we stated that "an action under 42 U.S.C. §1981 requires a showing of discriminatory intent." Id. 614 F.2d at 1309 and 1315. We further stated that under Title VII in suits seeking to prove disparate treatment, discriminatory intent is also required, but may not be under Title VII claims seeking to prove disparate

impact. Id. 614 F.2d at 1309 and 1315.[2] In Crawford we remanded the case as to all plaintiffs who established a "significant showing of statistical disparity . . . coupled with credible evidence of racial conduct." Id. 614 F2d at 1318. We affirmed, however, the judgment rendered against the two plaintiffs who presented no evidence of racially motivated conduct toward them. Id. 614 F.2d at 1318.

The plaintiff Vasquez nevertheless contends that, in cases involving disparate impact under section 1981, discriminatory intent need not be proved. In support of his contention he relies on the standard used in Title VII suits, where intent is only a necessary element of the plaintiff's

2. The plaintiff strongly contends that intent under a section 1981 claim need only be shown in suits involving disparate treatment cases. Regarding Title VII suits the plaintiff is correct; however, for a suit under section 1981 this circuit requires discriminatory intent be shown in disparate impact claims. See Crawford, 614 F.2d at 1309, 1315.

burden where disparate treatment has been shown, and on his belief that jurisprudence establishing the standard under section 1981, which requires the plaintiff to show intent, was erroneously based on constitutional cases. In confirming that a plaintiff must show intent in a section 1981 case before the burden shifts to the defendant, we have distinguished the less stringent requirements applied to Title VII claims which do not require proof of discriminatory purpose. Grigsby v. North Miss. Medical Center, Inc., 586 F.2d 457, 460-61(5th Cir. 1978). In so doing, the court recognized that Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978), which in turn relied on Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), "equated §1981 standards with the purposeful discrimination requirement of the fifth and fourteenth amendments." Grigsby v. North Miss. Medical Center, Inc., supra, 586 F.2d at 461. Vasquez essentially contends, then, that Williams and the subsequent

Fifth Circuit decisions were incorrect in holding that under Washington v. Davis discriminatory intent must be proved in section 1981 claims, as well as in constitutional-based claims. This panel is unable, however, to disregard prior circuit precedent.

[2] The defendant employer presented evidence that its policy of hiring only English speaking truck drivers was supported by a legitimate, non-discriminatory reason, i.e., business advantage and convenience of having truck drivers able to communicate with both English and Spanish speaking customers and to understand instructions by the owners, who speak only English. The district court found on the evidence presented that the English-speaking language requirement was not shown to be instituted for the purpose or intent of discriminating against Mexican-Americans, a prerequisite for recovery under a section 1981 claim. Crawford v. Western Elect. Co., Inc., supra, 614 F.2d at

1309, 1315. C.f., Washington v. Davis, 426 U.S. 229, 238-39, 96 S. Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) (burden of proof under the fifth amendment); Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1980) (On rehearing). The Court further found that the evidence indicated the percentage of Mexican-Americans in the defendant's work force had not been affected by the new policy.

Based on the record before us we cannot say the factual findings of the district court are clearly erroneous. Fed.R.Civ.P. 52(a). Therefore, we AFFIRM the district court's order that the plaintiff take nothing due to his failure to prove the requisite discriminatory intent by the defendant employer in its language-requirement.

AFFIRMED.

United States Court of Appeals

For the Fifth Circuit

October Term, 19

NO. 81-2114

D.C. Docket No. CA-B-78-135

NATIVIDAD VASQUEZ,

Plaintiff-Appellant,

versus

McALLEN BAG & SUPPLY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, GARZA and TATE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and

briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

November 6, 1981

ISSUED AS MANDATE: November 30, 1981

Opposition

NO. 81–1548

Office - Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIVIDAD VASQUEZ,

Petitioner

versus

McALLEN BAG & SUPPLY COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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NO. 81-1548

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NATIVIDAD VASQUEZ,

Petitioner

versus

McALLEN BAG & SUPPLY COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF IN OPPOSITION

Comes now Respondent, McAllen Bag & Supply Company, and respectfully prays that Petitioner's request for the issuance of a Writ of Certiorari herein be denied.

REPLY TO THE STATEMENT OF THE CASE

The instant case involves a small business run by a man and his wife, neither of whom speak Spanish (R. 75, 82). The business employs some twenty persons, most of whom work in the company's warehouse or as truck drivers. (R. 75, 80).

The owners of the business spend at least 10% to 25% of each day talking to and dealing directly with the company's

warehousemen and truck drivers, (R 92), whose duties include many tasks which require a working knowledge of the English language. (R 72, 73, 83).

Over the years the company has employed numerous persons of Mexican-American ancestery, including some who could not speak English. The language barrier has often presented difficulties, however, which have included instances where employees have not known what merchandise they were supposed to deliver to particular customers (R 74), and which included one incident where an entire load of merchandise was misdelivered to a customer in a town some 150 miles from the Respondent's warehouse (R 72).1/

As a result of these difficulties, the ability to speak English was made a prerequisite to employment with the company. Despite such requirement, the Respondent continued to hire and employ at least as great a percentage of persons of Mexican-American ancestry as existed in the population at large (R. 21, 80, 81, 177), and, when it became impossible for the company to re-employ the Petitioner because he spoke no English, the person hired in his place was himself of Mexican-American ancestry who could speak both English and Spanish. (R. 85).

The Petitioner nevertheless sued Respondent under 42 U.S.C., §1981 and 2000e, alleging that Respondent's refusal to hire him on the basis of his inability to speak English constituted national origin discrimination. The complaint did not identify Appellant as a Mexican-American, Hispanic-American, or Spanish speaking American (R 101–103). It merely stated that he was denied employment because he did not speak English (R. 101).

1/ The Petitioner himself was when formerly employed unable to communicate with the Respondent's owners. (R. 87).

Since the Petitioner had not satisfied the jurisdictional prerequisites for bringing a cause of action under §2000e, (R 148), the Court dismissed such cause of action (R 150), and the case proceeded under §1981.

After a trial on the merits, the Court found that the Petitioner had failed to produce any evidence that the Respondent's language requirement was motivated by discriminatory intent (R 176) and entered its judgment that he take nothing.

ARGUMENT

[A] *Response To The Questions Presented By Petitioner For Review. (Brief, p. i)*

Petitioner states the first question for review herein to be whether §1981 prohibits discrimination based on national origin. The issue actually stated by the Court (and pretermitted (Opinion, p. 2)) was whether the Petitioner ". . ***stated a claim*** of discrimination based on national origin ***that is cognizable under section 1981.***" (Emphasis Supplied, Opinion, p. 2). The issue raised was whether it was incumbant upon the Petitioner to allege that he was discriminated against on the basis of his race or color, or at least to show that the group with which he was affiliated was treated differently than "white" persons.

[B] *Response To The Reasons Asserted By Petitioner For The Granting Of A Writ (Brief pp. 5—32)*

[1] *With respect to the first reason asserted: Petitioner's complaint was insufficient to state a cause of action under Title USCA, §1981.*

Petitioner's allegation failed to state a claim under §1981 for two reasons:

[a] First, they made no reference to race or color, but only to national origin. 2/ The Courts have long held that the Civil Rights Act of 1866 was directed at discrimination on the basis of race or color, *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409 (1968); *McDonald v. Santa Fe Trail Transport Co.*, 427 U.S. 273 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), but not at national origin discrimination as such. *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632 (5th Cir. 1981); *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977); *Jacobson v. Industrial Foundation of the Permian Basin*, 456 F.2d 258 (5th Cir. 1972); *Patel v. Hollen Howe Motels*, 483 F. Supp. 374 (S. D. Ala. 1979); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 1186 (D. Md. 1977); *Budinski v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977); *Jones v. United Gas Improvement Corp.*, 68 FRD 1 (E. D. Pa. 1975); *Vasquez v. Werner Continental, Inc.*, 429 F. Supp. 513 (N. D. Ill. 1977); *Zubero v. Memorex, Inc.*, 12 BNA FEP Cas 604 (S. D. Cal. 1976); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D. N.M. 1978); *National Assn. of Government Employees v. Rumsfeld*, 413 F. Supp. 1224 (D.C. Dist. Col. 1976, aff'd without op. 556 F.2d 76 (D. C. Cir. 1977); *Kurylas v. U.S. Department of Agriculture*, 373 F. Supp. 1972 (D. D.C, 1974), aff'd mem. 514 F.2d 894 (1975); *Capers v. Long Island Railroad*, 429 F. Supp. 1359 (S. D. N.Y. 1977); *Mouriz v. Avendale Shipyards, Inc.*, 428 F. Supp. 1025 (E.D. La. 1977); *Gomez v. Pima County*, 426 F. Supp. 816 (D. Ariz. 1976); *Gradillas v. Hughes Aircraft Company*, 407 F. Supp. 865 (D. Ariz. 1975).

2/ The entire trial was conducted on the premise that what was being complained of was discrimination on the basis of national origin -- not race, color or ethnic grouping.

Although the term "white citizens" as used in §1981 has been held to prohibit all color conscious discrimination, allegations of national origin discrimination as such have never been cognizable under §1981. ***Bullard, supra Oivarez, supra; Patel, supra; Jones v. United Gas, supra; Budinski, supra; Martinez, supra; Mouriz, supra; Gradillas, supra; Zubero, supra; Apodaca, supra; Kurylas, supra.*** As the Court stated in ***Gomez v. Pima County, supra:***

> ". . .Mexican-American/Spanish surnamed individuals of Brown race or color who allege that they have been discriminated against ***because of that race or color*** have stated a claim for relief under Title 42 U.S. C.A. §1981, ***but have no claim under §1981 for discrimination based upon national origin.***" (Emphasis Supplied) at p. 819.

In ***Jones v. Alfred H. Meyer Co., supra,*** this Court stated that:

> ". . .In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . .the statute [1982] deals only with racial discrimination ***and does not address itself to discrimination on grounds of religion or national origin.***" (Emphasis Supplied), at p. 413.3/

Having failed to allege wherein he was denied the same rights and benefits as are enjoyed by "white citizens", the Petitioner failed to state a claim under §1981.

3/ Although *Jones* was concerned with §1982, the limitation of §1982 to racial discrimination would appear to apply equally to §1981. *Runyan v. McCrary*, 427 U.S. 160; *State of Georgia v. Rachel*, 86 S. Ct. 1782, 1789 (1966).

[b] Even if national origin discrimination were as such prohibited by §1981, in complaining that the Respondent's language requirement favored one group of Mexican-Americans (those who are bilingual) over another group (those who speak only Spanish) the Petitioner did not complain of national origin discrimination, but rather of discrimination against a sub-group (monolingual) of a national origin group (Mexican-Americans) in favor of another sub-group (bilingual) of the same national origin group. 4/ Petitioner argues that §1981 extends beyond national origin discrimination to bar sub-group distinctions which have no effect upon the national origin group as a whole. (Brief, pp. 9–11).

Such argument proceeds from the assumption that language is an "inseparable" aspect of national origin and that any preference accorded on the basis of language *automatically* constitutes discrimination on the basis of national origin. (Brief, pp. 9–11).

While it is true that the Civil Rights Act of 1964 prohibits the use of language as a fulcrum for national origin discrimination, *(Lau v. Nichols*, 414 U.S. 563 (1974); *Garcia v. Gloor*, 618 F.2sd 264 (5th Cir. 1980)), Petitioner is not herein viewing it in that context. Rather, he is viewing language as if it were an employment consideration which is proscribed by the Civil Rights Act *independently* of its effect upon the national origin group as a whole.

In *Lau*, this Court dealt with a public school system

4/ The trial court recognized the nature of such assertion in a dialogue with counsel for Petitioner early in the trial, wherein it repeatedly asked him to clarify the question of whether or not language discrimination, *rather than* national origin discrimination, was at issue in the lawsuit. (R 26–29).

which was legally bound to ensure ". . . the mastery of English by *all* pupils in the schools," (*Id.* at p. 565), and to educate *all* resident children between the ages of six and sixteen years. Since a mastery of the English language was deemed essential to any meaningful education in California (*Id.* at p. 566), this Court concluded that the system's failure to provide monolingual Chinese-speaking children with adequate instructional procedures for learning English denied them meaningful participation in the educational program in contravention of Title VI and certain HEW guidelines. (at p. 568). The school system was not, as is the case here, forced to choose *between* the language sub-groupings of a particular national origin group in order to fill a limited number of vacancies. There was no indication that educational programs designed to help Chinese-speaking students would work to the detriment of English-speaking Chinese-American students.

In the instant case, by contrast, the Respondent has a finite number of positions to fill, most of which will be filled by either bilingual or monolingual Mexican-Americans. The displacement of bilingual Mexican-Americans by those who, like Petitioner, speak only Spanish would deprive just as many Mexican-Americans of employment opportunities as would the displacement of those speaking Spanish by those who are bilingual. Unlike the San Francisco School system's obligation to provide an education to all Chinese-American children residing within its boundaries, the Respondent's decision to employ a member of either language sub-grouping of the national origin group would necessarily displace a member of the other. Such decision is neutral in its effect upon the national origin group as a whole, however, and thus does not fall within the purview of either §1981 *or* §2000e. [5/] It is, rather, a matter of business judgment

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5/ cf *EEOC v. Naranjo Refining Co.*, 593 F.2d 988 (10th Cir. 1979).

which is properly left to the discretion of the employer. *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978).

[2] ***With Respect To The Second Reason Asserted: Proof of Intentional Discrimination Is Required Under §1981.***

The vast majority of those courts which have considered the issue have held that §1981 requires a showing of discrimination intent. *Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5th Cir. 1980); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Baldwin v. Birmingham Board of Education*, 648 F.2d 1150 (5th Cir. 1978); *Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Chicano Police Officer's Association v. Stover*, 552 F.2d 918 (10th Cir. 1977); *Walker v. Robbins Hose Company No. 1, Inc.*, 465 F. Supp. 1023 (D. Del 1979); *Arnold v. Ballard*, 448 F. Supp. 1025 (N. D. Ohio 1978); *Milburn v. Girard*, 441 F. Supp. 184 (E. D. Pa. 1977); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949 (D. Md. 1977); *Croker v. Boeing Company*, 437 F. Supp. 1138 (E.D. Pa. 1977); *Guardians Association of N.Y.C. v. Civil Service Commission*, 431 F. Supp. 526 (S.D. N.Y. 1977); *Johnson v. Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977); *Drayton v. City of St. Petersburg*, 477 F. Supp. 846 (M. D. Fla. 1979); *Stewart v. Hannon*, 469 F. Supp. 1142 (N. D. Ill. 1979); *Rich v. Martin Marietta*, 467 F. Supp. 587 (D. Colo. 1979); *Flora v. Moore*, 461 F. Supp. 1104 (N. D. Mis. 1978); *Stewart v. City of Pontotoc, Mississippi*, 461 F. Supp. 767 (N.D. Miss. 1978); *National Organization for Woman v. Waterfront Commission of New York*, 460 F. Supp. 84 (S.D. N.Y. 1978); *United States v. City of Buffalo*, 457 F. Supp. 612

W.D. N.Y. 1978); *Queen v. Dresser Industries, Inc.*, 456 F. Supp. 257 (D. Md. 1978); *Ortiz v. Bach*, 14 FEP 1019 (D. Colo. 1977); *Williams v. City and County of San Francisco*, 483 F. Supp. 335 (N.D. Cal. 1979); *Gay v. Waiters' Dairy and Lunch Men's Union Local No. 30*, 489 F. Supp. 282 (N.D. Cal. 1980); *Bronze Shields v. New Jersey Department of Civil Service*, 488 F. Supp. 723 (D. N. J. 1980).

Petitioner nevertheless argues that this Court confined its "proof of intent" holding in *Washington v. Davis*, 426 U.S. 299 (1976) to cases brought under the 14th Amendment, and that the lower Courts have only required proof of intent in §1981 cases involving "state action", or "disparate treatment", or both. (Brief, p. 14).

Any question of this Court's intent should have been laid to rest by its reversal of the 10th Circuit Court's decision in *Chicano Police Officers' Association v. Stover*, 526 F.2d 431 (10th Cir. (1975), rev'd 426 U.S. 944 (1975) on remand 552 F.2d 918 (1975)). *Stover* was a §1981 case which was first decided by the 10th Circuit in November of 1975, some four months prior to this Court's decision in *Washington v. Davis*. In its initial opinion, that Court held that proof of discriminatory impact was sufficient to sustain a cause of action under the Civil Rights Act of 1866, and that the measure of a claim under such act:

> "[i]s in essence that applied in a suit under Title VII of the Civil Rights Act of 1964." (at p. 438).

On June 21, 1976, however, this Court vacated the 10th Circuit's judgment and specifically remanded the case for further consideration ". . .in light of *Washington v. Davis* . . ." . (426 U.S. 944 (1975)). Had this Court intended its holding in *Davis* to be confined to constitutional issues, it would have had no cause to reverse the 10th Circuit

Court's decision, since *Stover* had nothing to do with the 14th Amendment. On remand (552 F.2d 918), the 10th Circuit had the following to say:

> "The error in our holding and the views expressed by us is clear. We stated that we agreed '. . .that the measure of a claim under the [1966] Civil Rights Act is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964.' 526 F.2d at 438. ***This was contrary to the principal holding that came in Washington v. Divis, supra,*** at 426 U.S. 238, 96 S.Ct. 2040." (Emphasis Supplied) at p. 920.

The Court in *Arnold v. Ballard, supra,* also analyzed carefully this Court's decision in *Davis,* concluding that:

> "The Supreme Court did . . .in part III of ***Washington v. Davis,*** imply that proof of discriminatory intent would thereafter be a necessary element of proof for §1981 claims. The plaintiffs in ***Washington v. Davis*** had not only alleged violations of the 14th Amendment by the District of Columbia government, but had also brought claims under §1981 and the Civil Service Act of 1883, ... In proceeding to affirm the District Court's holding that the defendants were entitled to summary judgment on both statutory and constitutional grounds, the court necessarily intimated that Title VII standards were no longer applicable to claims under §1981. This is because the District Court had not found the pre-employment test to be 'job-related' as that term had been

> previously construed in employment discrimination cases." at p. 1027, 1028.

With respect to state action, the Courts do not mention its existence in most §1981 cases wherein they have required proof of intent, and there is no indication in any of the said opinions that the intent requirement was predicated upon it. Indeed, in some cases, state action was expressly found *not* to exist, resulting in the denial of §1983 claims. (cf *Flora v. Moore, supra,* (at p. 1115). 6/

Moreover, there is no legal or rational basis for making the proof of intent requirement dependent upon the existence of state action. Petitioner's argument incorrectly assumes that proof of intent would not be required with respect to claims brought under the 13th Amendment or the Civil Rights Act of 1866. The 10th Circuit, it will be noted, however, interpreted this Court's reversal of its decision in *Stover* to mean that proof of discriminatory intent *is* necessary in cases founded upon the 1866 Civil Rights Act. (*Id.* at p. 920). Moreover, in *City of Memphis v. Greene,* ____ U.S. ____ (1981) this Court was expressly requested to determine whether claims brought under §1982 and the 13th Amendment itself require proof of discriminatory intent. Although the majority of the Court preferred to avoid a discussion of the issue, Justice White, who authored the majority opinion in *Davis,* expressly addressed it and concluded that:

> "We have no basis for concluding anything other than that §1982 requires some showing of racial animus or an intent to discriminate on the basis of race." (at p. 1604).

6/ Neither did most of the §1981 cases involve "disparate treatment".

In arriving at his conclusion, Justice White noted that the authors of the 1866 Civil Rights Act. . .

> ". . .emphasized time and again that the measure was designed to eradicate ***blatent*** deprivations of civil rights. . ." (at p. 1603), and that ". . .nothing in the legislative history of this Act suggests that Congress was concerned with basically neutral measures which happened to have an incidental impact on former slaves. On the contrary, the theme of the debates surrounding this statute is that the former slaves continued to be subject to the direct, ***intentional*** abuses at the hands of their masters. ***That*** was the problem Congress intended to address, and that focus should determine the reach and scope of this statute." (Emphasis Supplied, at p. 1604).

In agreement with this view are the opinions of the Courts in cases such as ***Bronze Shields, supra,*** wherein the Court noted that:

> "It is unlikely. . .that the concept of disparate impact could have been within the contemplation of the legislators, much less been incorporated into the Statute. The goal of the legislation was to revent intentional acts of discrimination aimed at circumventing the grant of civil rights to the freed slave. The outcry was against blossoming statutes and codes aimed at defeating and denying the newly won freedoms. The legislative history renders no support for the construction urged by plaintiffs. Although the debates are free of any discussion of burden or standard of

> their review in the context of the times does not warrant a finding that discriminatory impact, in the absence of an intention to produce such result, violates the statute. Nor does the language of the statute itself support such a conclusion." at p. 729.

Petitioner's arguments thus find no support in either the text or the legislative history of §1981 or the Civil Rights Act of 1866.

[3] ***With Respect To The Third Reason Asserted: The Standard For Purposeful Discrimination Imposed By The Lower Courts Was Correct.***

Title VII and §1981 do not provide "parallel and overlapping" remedies as Petitioner would define such term. *Chicano Police Officers' Assn. v. Stover*, 552 F.2d 918, at p. 920; *Arnold v. Ballard, supra*, at pp. 1027 and 1028. As the Court stated in *Chicano Police Officers' Assn., supra*, such a notion is ". . .contrary to the principal holding that came in *Washington v. Davis, supra*" at p. 920.

The cases cited by Petitioner (Brief pp. 24, 25) in support of the application of Title VII standards to §1981 claims are inapposite: This Court did not even imply in *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) that a Plaintiff's §1981 burden was coextensive with his Title VII burden. Likewise, in *Waters v. Wisconsin Steel Works of International Harvester Company*, 502 F.2d 1309 (7th Cir. 1974), and in *Blum v. Gulf Oil Corporation*, 597 F.2d 936, (5th Cir. 1979) the Courts did not purport to do away with or alter the Plaintiff's burden of showing discriminatory intent; indeed, the facts in *Waters* leave no doubt about the existence of discriminatory intent, (at pp. 1316 and 1317),

and in *Blum* the Court merely used the "parallel and overlapping" analysis to substantiate its holding that §1981 claims have no greater merit than Title VII claims.

As for the proper standard to be used in *determining* discriminatory intent, this Court stated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) that "discriminatory purpose", within the meaning of the 14th Amendment:

> ". . .implies more than intent as violation of intent as awareness of consequences. See United Jewish Organizations v. Carey, 430 U.S. 144, 179, 97 S. Ct. 996, ... It implies that the decision maker, . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." at p. 279.

If the standard of intent used in 14th Amendment cases is to be that applied in §1981 cases, then the term "discriminatory purpose" or "discriminatory intent" must mean something more than intent as violition or intent as awareness of the consequences of the acts undertaken. Indeed, this Court in *Feeney* specifically rejected the contention that "discriminatory intent" is shown when one is shown to have intended the reasonably foreseeable consequences of his actions.

As this Court said:

> "The Appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions." at p. 2295.

Addressing itself to the obvious foreseeability of the Legislature's action in that case, this Court said:

> "It would thus be disingenious to say that the adverse consequences of this Legislation for women were unintended, in the sense that they were not foreseeable.
>
> 'Discriminatory purpose' however, implies more than intent as volition or intent as awareness of consequences."

In the instant case, the District Court thus applied the correct standard in determining whether intentional or purposeful discrimination had occurred.

[4] ***With Respect To The Fourth Reason Asserted: The Trial Court Was Correct In Requiring Proof of Intent To Discriminate In A §1981 Action.***

Proof of discriminatory intent is not, as Petitioner would have it, ". . . only relevant to a disparate treatment case". (Brief, at p. 26). If it were, this Court's principal holding in ***Washington v. Davis, supra,*** (a disparate impact case) would be in error.

Moreover, this Court has strongly indicated that proof of intent is necessary to maintain a cause of action under the Civil Rights Act of 1866 and/or the 13th Amendment (***Washington v. Davis, supra; Chicano Police Officers' Assn. v. Stover***, (426 U. S. 944), a view which Justice White voiced in *City of Memphis v. Greene, supra.*

The fact that the trial court herein followed such holdings, (and the consistant line of Circuit Court decisions in accor-

dance therewith) by requiring proof of discriminatory intent in a §1981 case did not constitute ". . .the [mistaken application of] a standard that is only relevant to a disparate treatment case." (Brief, p. 26).

CONCLUSION

Wherefore, Respondent respectfully prays that the request of Petitioner that a Writ of Certiorari issue herein, be in all things denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of March, 1982, I have mailed three true and correct copies of the foregoing Brief In Opposition, to Counsel of Record, George P. Powell, Texas Rural Legal Aid, Inc., 259 South Texas, Weslaco, Texas 78539, by depositing said copies in the U.S. Mails, certified mail, return receipt requested.

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